SUPREME COURT, U.S.
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In The Supreme Court Of The United States

No. 79-1317

DOROTHY NELL HUNT
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondant.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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In The Supreme Court Of The United States

No._____

DOROTHY NELL HUNT
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STATE OF OKLAHOMA,
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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Petitioner, Dorothy Nell Hunt, does respectfully pray for a Writ of Certiorari to issue to the Court of Criminal Appeals in and for the State of Oklahoma to review its Judgment modifying the judgment of conviction of the District Court Tulsa County, State of Oklahoma, to which petitioner was sentenced as follows:

> ". . . three years imprisonment and a fine of fifteen thousand dollars . . . "

The sentence on appeal was affirmed and modified to:

> ". . . one (1) year imprisonment and a fine of five thousand dollars . . ."

OPINIONS BELOW

Trial was had in the District Court, Tulsa County, State of Oklahoma and was tried to a jury.

The opinion and judgment of the Court of Criminal Appeals of the State of Oklahoma is appended hereto as Appendix "A".

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

1. The date of the Judgement of the Court of Criminal Appeals for Oklahoma sought to be reviewed is October 10, 1979. The time of entry of said Judgment is October 10, 1979.

2. Petitioner's did petition for rehearing (see Appendix "B") on the 22nd day of October, 1979, with said Petition being denied on the 13th day of November, 1979. No further appeal is permitted under Oklahoma law.

3. The statutory provisions which confers jurisdiction of this Court to review the judgment in question by Writ of Certiorari is 28 U.S.C. §1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether The Statute Under Which This Prosecution Was Maintained 21 OSA §1040.51 Is Unconstitutionally Vague, Overboard and Ex Post Facto In Its Application and Unconstitutional On Its Face In Violation Of Both State And Federal Constitutions.

2. Whether the Provisions of 22 OSA §1066 Allowing

The Court To Modify A Decision Rendered By A Jury Is Unconstitutional As Violating Constitutional Rights Of Due Process And Equal Protection.

3. Whether Giving The Prosecution Discretion To Choose Whether To Charge A Defendant With A Felony Or Misdemeanor For The Same Act Committed Under The Same Circumstances By Persons In Like Situations, Is Violative Of The 14th Amendment Equal Protection Clause

4. Is Failure to Give a scienter instruction reversable error or harmless error.

STATEMENT OF CASE

This case came on for trial on the 1st day of March, 1976, over the objections of the defendant and her counsel on the basis that the Information failed to properly allege a crime, all before the Honorable Richard V. Armstrong, in Tulsa County, State of Oklahoma, District Court, Case Number CRF 74-154.

The State presented one (1) witness, Lynn Jones, who testified that she purchased the motion picture which was on trial herein, along with several other items, made the arrest on the spot without the benefit of an arrest warrant or prior viewing by an impartial magistrate; the State introduced the motion picture into evidence and rested.

The defendant put on four (4) witnesses and rested and after closing argument, the jury returned a verdict of a

fine of $15,000 and three (3) years incarceration in the State Penal System.

The said Judgment and Sentence was imposed on the 2nd day of April, 1976, with the filing of the Judgment and Sentence on the 21st day of April, 1976.

All post-trial motions have been duly overruled.

The defendant properly perfected her appeal to this highest Court of the State of Oklahoma, the Court of Criminal Appeals. That the decision of that Court was handed down on the 10th day of October 1979 with the decision being adverse to the defendant.

That on the 22nd day of October, 1979 a petition for rehearing was filed which was overruled without opinion on the 13th day of November, 1979.

The Constitutional questions raised in this Writ for Certiorari were timely raised in the trial Court and highest Court of the State. Said Motions were made in writing and orally.

ARGUMENT

IS THE STATUTE UNDER WHICH THIS PROSECUTION IS BEING MAINTAINED UNCONSTITUTIONALLY VAGUE, OVERBROAD AND UNCONSTITUTIONAL OR ITS FACE, IN VIOLATION OF BOTH THE STATE AND FEDERAL CONSTITUTIONS.

The defendant was accused of violation of Section 1040.51 which states as follows:

§ 1040.51 Pictures, movies, etc. showing acts of sexual intercourse or unnatural copulation prohibited — Exceptions — Penalties

Any person who knowingly buys, sells, barters, traffics in, or causes to be delivered or transported in Oklahoma, any picture, moving picture, series of pictures, drawing, diagram or photograph of any person or animal or caricature thereof in an act or acts of sexual intercourse or unnatural copulation shall be deemed guilty of a felony, and shall be punished by a fine of not to exceed Twenty-five Thousand Dollars ($25,000.00), or by imprisonment for not to exceed fifteen (15) years, or by both such fine and imprisonment. Provided, that nothing contained herein shall prohibit the use of any of the above mentioned items pursuant to medical prescription by a duly licensed physician in the State of Oklahoma, or in recognized schools of medicine or veterinary science for educational purposes. The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry. Laws 1968, c. 257, § 1, emerg. eff. April 29, 1968.

The statutes as written and as applied to this defendant at the time of the trial of this case was clearly repugnant to the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States and the analogous amendments to the Constitution of the State of Oklahoma, in the following respects:

a) The statute is void for vagueness in that it forbids or requires the doing of act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.

b) Said statute is void for overbreadth by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms in that the Statute sets forth no standards prescribed by the United States Supreme Court in First Amendment matters, as set for in *Memoirs v. State of Massachusetts,* 383 U.S. 413, 86 S.Ct. 975, 16 L. 3d. 2d and *Miller v. California*, 93 S.Ct. 2607, 413 U.S. 15, 37 L.Ed. 2d. 419.

c) Said statute is further void for impermissible overbreadth in that there is no scienter requirement that the parties sought to be held criminally accountable have knowledge of the fact and character of the obscenity of the material charged.

d) Said statute is further void for impermissible overbreadth in that there is no requirement and definition of the commission of the crime and that the statute in itself omits the requirements set forth in *Memoirs v. Massachusetts,* supra, and *Miller v. California,* 93 S.Ct. 2607, 413 U.S. 15, 37 L.Ed. 2d 419, and makes matters which do not appeal to the purient interest, do not violate contemporary community standards, and have social value, crimes under the statute. Again, Section 1040.51 makes no reference to "obscenity" or obscenity tests in its proscription of motion pictures, books or any other adult-type matters dealing with sexually oriented materials. This is an apparent attempt by the Oklahoma Legislature to circumvent the tests of obscenity as set forth by the U.S. Supreme Court.

In *Jacobellis v. Ohio,* 378 U.S. 1843, 12 L.Ed. 2d 793, 84 S.Ct. 1676, Justice Brennan delivering the opinion of the Court stated that motion pictures are a form of expression within the ambit of the First Amendment and only obscenity could be excluded from this protection. Justice Brennan stated at Page 187 and 188:

> "Motion pictures are within the ambit of the constitutional guarantees of speech and of the press."
>
> * * *
>
> "Since it is only "obscenity" that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law."

Since it is apparent from the above that motion pictures must be obscene to be suppressed as criminal conduct, this Brief could probably be concluded at this point, as to the issue of whether State Legislature can circumvent the obscenity test as established by the Supreme Court of the United States in proscribing motion picture films.

In analyzing the situation and the statute involved, it is useful at this time to explore the nature of state regulation of obscenity as developed by the United States Supreme Court. The most recent series of cases on obscenity handed down by the Court reiterate many of the long standing principles of permissible state regulations.

For instance, in *Miller v. California*, 38 S.Ct. 2607, 413 U.S. 15, 37 L.Ed. 2d 419 appears:

> "State statutes designed to regulate obscene materials must be carefully limited. See *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 682-685 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political or scientific value."

As can be readily seen, the latest enunciated standard by the Court is in reality a two-part standard. First the regulation must be limited to specifically defined sexual conduct. That is what is at least attempted by the language of 21 O.S. 1040.51. In the second instance, however, the Court still insists that a three-part standard be applied to determine whether or not the material is in actually obscene. This standard, albeit modified from the former Roth-Alberts three-pronged test, must still be applied by any Court and jury in any case wherein printed materials might be suppressed.

In fact and in law, in light of the above definitive cases on the subject, printed or filmed materials sought to be regulated are at least initially presumptively protected First Amendment materials requiring judicial and jury determinations of whether or not they meet the standards

for obscenity as they may exist at the time and in the community. Hard core pornography is not susceptible of a simplistic definition. Potter Stewart has said, "I can't define it, but I know it when I see it." If this is what the Legislature attempted to define in 1040.51, it nevertheless must be viewed in light of the procedural safeguards and relevant tests as set up by the Courts. It also well to note that such procedural and definitional safeguards either expressly stated or incorporated by reference in our decision.

The Oklahoma Court recognized the unconstitutionality of the statute prior to *Miller,* supra, by its decision in *McCrary v. State of Oklahoma,* 507 P. 2d 922 (1973), and *Cherokee News v. State of Oklahoma,* 533 P. 2d 624, after remand from the United States Supreme Court and saved the statute by overlaying the elements set forth in *Miller*, supra.

In June, 1974, in *Hamling v. United States,* 94 S.Ct. 287, it provided that it is generally sufficient that indictments set forth the offense in the works of the statute itself as long as those words themselves fully direct and expresses, without any uncertainity and ambiguity, and sets forth all the elements necessary to constitute the offense intended to be punished. *Miller* was very explicit when it stated that "State statutes designed to regulate obscene materials must be carefully limited." As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable State law as written

or authoritatively construed. A state offense must also be limited to works which, when taken as a whole, appeal to the prurient interest in sex, which portrays sexual conduct in a patently offensive way, and which when taken as a whole, do not have serious literary, artistic or scientific value". At the very least, the statute involved should have the elements of the crime plead and proven in its information. This Court in *McCrary* and *Cherokee* has stated that the statutes are constitutional by overlaying the elements but if the information fails to allege the elements the statutes can be no less unconstitutionally applied and hence the denial of the appellants' constitutional rights.

As a result thereof, on the face of the statute and in the application thereof in conjunction with the overlaid *Miller* elements, it necessarily follows that a man or woman must put his or her individual freedom in serious jeopardy of suffering excessive criminal sanctions *before* a determination by the individual can be made as to whether or not specific conduct is proscribed by the laws of the State of Oklahoma. In other words, the individual must be before the Court, charged, in this case, with a serious crime against the State, before there is any determination as to what community standards do exist. Since the jury or the Trial Court, in a non-jury proceeding, must decide and interpret what the contemporary community standards are at that time which will fluctuate with time and different juries, the defendant must place himself in jeopardy of suffering criminal sanctions before he or she or counsel in

advising clients, can determine whether or not specific conduct falls within or without the confines of the law. It necessarily follows that the statute as written, construed and applied is ex post facto in its application, and is unconstitutionally vague and overbroad in that it does not sufficiently apprise the individual as to what activity constitutes a crime against the State until and after that particular individual becomes a particular defendant in criminal proceedings carrying heavy sanctions imposed by the State.

ARGUMENT II

IS THE PROVISION OF 22 O.S. §1066, ALLOWING THE COURT TO MODIFY UNCONSTITUTIONAL AS VIOLATING CONSTITUTIONAL RIGHTS OF DUE PROCESS AND EQUAL PROTECTION.

In pertinent part, 22 O.S.A. §1066, states as follows:

> "The Appellate Court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the Court below, with proper instructions, and the opinion of the Court, within the time and in the manner, to be prescribed by the rule of the Court.

As indicated in the language stated above, the legislature has apparently given the Court of Criminal Appeals, among its other powers, the power to modify the decision of the trial court. Petitioner hereby contends that such power is unconstitutional for it violates due process and equal pro-

tectional clauses of the state and federal government.

The petitioner would show that such power to modify is violative of due process in that it in effect deprives the petitioner of a trial on the facts of the matter by a fair and impartial jury of his peers and subjects any decision by said jury body to change and modification by the Court of Criminal Appeals. Thus, where the Constitution of Oklahoma and the United States have provided in criminal matters, a citizen with a right to a jury trial, and the right to have the charges leveled against him be tried by a panel of his peers, the Court has a duty to protect that right and to see that it is not deprived by a trial court or arbitrarily superceded by the appeals court.

Badgwell v. State of Oklahoma, 418 P. 2d 114, *Maugell v. State,* 97 Okl. Cr. 180, 260 P. 2d 447; Article 2, Section 20, Oklahoma Constitution, and *Nichols v. State,* 418 P. 2d 77.

In *Nichols v. State*, supra, the Court made the following pronouncements:

> "Where it appears on appeal that defendant has been denied a right guaranteed by Constitution *such showing requires a reversal,* unless record clearly shows that right was waived, or that no injury could have resulted to accused by reason of such denial."

and

> "*Jury is exclusive judge of weight of evidence and credit to be given to witnesses,* and, where there is direct conflict in evidence, or it is such that different inferences may be properly drawn from it, jury's determination will not be interfered with upon ground that evidence is insufficient to sustain conviction,

> where there is competent evidence in record from which jury might reasonably conclude that defendant is guilty." (Emphasis added)

The above exerpts illustrate the two important considerations to be weighed in the Court's evaluation of petitioner's contention herein. Initially, when error is found on appeal which deprives a Constitutional right, the remedy is to reverse the decision. In the particular case now before the Court, it has been demonstrated that because of numerous failures of the trial court, in particular its failure to give the proper instructions, petitioner was deprived of its right to a fair and just trial, with said error and injury being acknowledged by the Court's attempt to mitigate the sentence. The remedy for such a deprival is a *reversal.* Allowing the appeals court to modify as 22 O.S.A. §1066, does, is clearly unconstitutional for it does not give the petitioner her right to a fair trial but merely allows the appellate court to mitigate the damage by reducing the sentence. Again, mitigating an error is not rectifying a mistake or correcting a "constitutional deprivation". That portion of 22 O.S.A. §1066, allowing the Court to modify a jury decision is therefore unconstitutional.

Secondly, as indicated in the last exerpt cited, the process of weighing the evidence is *exclusively* the domain of the jury. The Court of Criminal Appeals, by modifying the sentence of the petitioner is clearly indulging in a weighing and balancing of the evidence. Such a procedure

is clearly beyond the scope of its authority and in effect deprives the petitioner of her right to a trial by jury. If error is discovered, the remedy is to reverse and correct, the court of appeals cannot be allowed to substitute its thinking for that of the jury. The jury is the exclusive weigher of the evidence and a statute such as 22 O.S.A. §1066 which empowers the Court of Criminal Appeals to supercede and modify the jury decision is clearly unconstitutional as being in violation of such process.

Finally, 22 O.S.A. §1066, in particular the power given to the Court of Criminal Appeals to modify, is unconstitutional for it is violative of the Equal Protection Clause of the Constitution. In *Clark v. State,* 53 Ariz. 416, 89 P. 2d 1077, the Court stated:

> "The Constitution does not require that a law should effect a person exactly alike, but there is a guarantee of like treatment to all persons similarly situated."

Petitioner would hereby show that 22 O.S.A. §1066, by allowing the appeals court to modify a sentence, in effect takes the decision-making power out of the hands of the jury and places it with the Court, and thus, subjects persons similarly situated to unlike treatment all as determined by the Court. Such discretionary powers allowing for unlike treatment is clearly unconstitutional and in violation of the equal protection clause. *Clark v. State,* supra.

ARGUMENT III

IS GIVING THE PROSECUTION DISCRETION

TO CHOOSE WHETHER TO CHARGE A DEFENDANT WITH A FELONY OR MISDEMEANOR FOR THE SAME ACT COMMITTED UNDER THE SAME CIRCUMSTANCES BY PERSON IN LIKE SITUATIONS, VIOLATIVE OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

In support of the above argument, petitioner would refer this Court to the dissent rendered by the learned Justice Brett where he indicated in his opinion: "that the action of the Oklahoma legislature, in passing the misdemeanor statute 22 O.S. 1971 §1040.8, which became effective March 27, 1979, repealed by implication the provision of 21 O.S. 1971, §1040.51, the felony statute, which became effective April 29, 1968" and under which the defendant was convicted.

A reading of the statues reveals that the subsequent misdemeanor statute covers everything that the felony statute covered and even more. The felony statute provides in brief, that any person who knowingly buys, barters, traffics in, causes to be delivered or transported any picture; series of pictures, drawings, diagram or photograph; or any person or animal or caricature in any act or acts of sexual intercourse or unnatural copulation, shall be deemed guilty of a felony.

The subsequent misdemeanor statute provides, in brief, that any person who knowingly photographs, act in, pose for, print, sell, offer for sale, give away, exhibit,

publish or offer to publish, otherwise distribute, make, display or exhibit any book, magazine, story or pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture, image, cast, slide, figure, instrument, statue, drawing, presentation or other article which is obscene, lascivious, lewd, or unfit as defined in 21 O.S. Supp. 1968, §1040.12, shall be guilty of a misdemeanor.

Considering the two statutes, it is improper to authorize the prosecutor to elect whether to charge a defendant with a felony or a misdemeanor for the same act committed under the same circumstances by persons in like situations.

People v. Calveresi, Colo. 534 P. 2d 316; *State v. Blanchey,* 75 Wash. 2d 926, 454 P. 2d 841, *Olsen v. Delmore,* 48 Wash. 2d 545, 295 P. 2d 324, and *State v. Pikey,* 281 P. 2d 698.

Petitioners proposition will be made clear by referral again to the general holding in *Clark v. State,* supra,

> "The Constitution does not require that a law shall affect all person exactly alike *but there is a guarantee of like treatment to all persons similarly situated."* (Emphasis added)

Applying the facts of the present case to the above general statement of law, a clear violation of equal protection can be observed. Because of the two existing and competing statutes there is the distinct possibility that other individuals in the same position as the petitioner herein will

be treated differently because, the prosecutor, at his own whim, elects to use one statute over the other. Such discretion vested in the prosecutor as indicated by the cases cited, is a violation of Equal Protection and any conviction based on such discretion and unconstitutional statutes need necessarily be reversed.

ARGUMENT IV

IS FAILURE TO GIVE A SCIENTER INSTRUCTION REVERSABLE OR HARMLESS ERROR

In the decision handed down by the Oklahoma Court of Criminal Appeals in this case on October 10, 1979, it was admitted by the Court that *error had occurred* at the trial level in that the Court had failed to give a scienter instruction. However, this Court rules that the error was harmless and therefore refused to vacate and reverse the trial court's judgment.

In support of the proposition that reversable error was committed, the petitioner would extend as authority, *Hanf v. State,* Okl. Cr., 560 P.2d 207 (1977). That case, like the case presently before this Court, dealt with a prosecution for the publication and distribution of pornographic materials and among the issues raised on appeal was the issue concerning the necessity to give a specific scienter instruction. The Court, in no uncertain terms stated:

> "In all future prosecutions under any obscenity statute *trial court must give, in addition to general in-*

struction on circumstantial evidence and statutory prohibitions, a scienter instruction that informs the jury that it must find beyond reasonable doubt from all the evidence, either direct or circumstantial or both, that defendant knew the contents of the material in question." (Emphasis added)

Thus, the above quotation from the syllabus in *Hanf v. State,* supra, clearly requires a scienter instruction as a necessary pre-requesite to any valid conviction obtained via enforcement of pornography laws similar to or the same as is now before the Court.

Also informative in this regard is the statement in *Hanf v. State,* supra, that failure to give a specific scienter instruction might be curable if the other instructions, taken as a whole or individually, did convey the scienter element. Citing *Smith v. California*, 361 U.S. 147, 80 S. Ct. 215, 4 L.Ed 2d 205 (1959), the *Hanf v. State* Court held the scienter element was not imparted to the jury and therefore the conviction could not stand.

As was already stated by this Court, no specific scienter instruction was given. The State, referring again to the Court's opinion at Page 6, attempted to justify this error by stating:

> "That because the word knowingly was in the information and because the jury was instructed that the State had to prove each element alleged in the information beyond a reasonable doubt, there was a sufficient instruction on scienter."

In response to this argument, the Court emphatically declared that it "*is absurd*".

Thus, in the light of the fact that this Court has specifically and in no uncertain terms, found that (1) no specific scienter instruction was given and (2) that the instructions that were given did not impart the element of scienter, the petitioner feels that this Court had no other course open but to reverse the trial court's conviction pursuant to the rulings in *Hanf v. State,* and *Smith v. California,* supra.

As final point that must be discussed is the Court's statement that the error that was committed was harmless and that the verdict would not have been different if proper instructions had been given. In response, petitioner would state that in light of the holdings in *Hanf v. State,* supra, and *Smith v. California*, supra, such a statement cannot be made. Those cases clearly hold a scienter instruction *must* be given in order to sustain a conviction under the applicable statutes. No leeway is provided for the Court in its decision making process. There being no such instructions given in this case, the Court, pursuant to the above, has no recourse but to reverse the decision of the trial court.

Secondly, the Courts statement that no contrary decision would have been reached is also a wrongful invasion by the Court of Appeals into the province of the jury. It is the accused's Constitutional right in Oklahoma, Article 2 § 20, to have a trial by jury. Corollary to this right, is the right of the accuseds' to have the verdict of the jury based upon the proper instructions, for it is in accordance with

these instructions that the jury is instructed to base its decision. Hence, it necessarily follows that if the instructions prove incorrect and not in accordance with the law, as in this case, the accused has not received a fair trial, and to allow the Court of Criminal Appeals to superimpose its own view as to what the jury *would decided* if the proper instructions had been given, clearly deprives the accused of his constitutional right to a fair and proper trial by jury and is a wrongful invasion of said right by this Court.

In conclusion to this proposition, petitioner feels the decision of this Court was erroneous for the above stated reasons and therefore should be reversed.

CONCLUSION

For the reasons set forth in the Petitioner herein, it is respectfully urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,
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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-76-821

DOROTHY NELL HUNT,
Appellant,
-vs.-
THE STATE OF OKLAHOMA,
Appellee.

— OPINION —

CORNISH, Presiding Judge:

The appellant was convicted of Unlawful Sale of Movies Showing Acts of Sexual Intercourse or Unnatural Copulation — 21 O.S.1971, § 1040.51 — in the District Court, Tulsa County Case No. CRF-75-154. In her appeal she challenges both the statute under which she was charged and the sufficiency of the State's case against her. She also complains of the information, the trial court's refusal to suppress evidence, the instructions given to the jury, and comments made by the prosecutor.

In her first assignment of error, the appellant contends that Section 1040.51 is unconstitutionally vague and is overbroad. However, in *State v. Combs,* Okl.Cr., 536 P.2d 1301 (1974), we held that the statute could be saved by construing it as implicitly incorporating the standards announced by the United States Supreme Court in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973):

"We therefore find the trial court upon applying §

1040.51 should instruct the trier of facts upon the express language of § 1040.51 and further should include within its instructions a jury charge stating that the jury find the average person applying contemporary community standards would find the work, taken as a whole, appeals to the prurient interest, that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value; and that the work depicts or describes in a patently offensive way the conduct prohibited under § 1040.51. As we construed above, we find § 1040.51 constitutional and may be constitutionally applied whenever the trier of facts is properly submitted the specific activity prohibited by § 1040.51 and those requirements construed as a part of § 1040.51 and those requirements construed as a part of § 1040.51 set forth in *Miller,* supra."

For that reason the first assignment of error is without merit.

The second assignment of error is that the information was defective. The appellant takes the position that if the statute under which she was charged can only be constitutional by having the *Miller* standards overlaid upon it, then the information should be written in terms of the *Miller* standards. There is some sense to this argument, but the United States Supreme Court has held that such particularity is not a constitutional requirement. In *Hamling v. United States*, 418 U.S. 87, 119, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974), the Court said that "obscene" is a term of art and that it is sufficiently definite to give a defendant notice of the charge against him or her. The preliminary information in the instant case merely charged

the appellant with selling motion pictures. But in response to the appellant's demurrer, the magistrate ordered the information amended to allege that said motion picture was obscene. With this amendment, in the light of *Hamling*, we must hold this assignment of error to be also without merit.

The appellant next argues that the District Court erred in overruling her motions to suppress the film for which she was charged and to quash the arrest on the grounds that she was arrested prior to any viewing of the film. It is true that in order to determine whether or not a work is obscene, one must view the work as a whole, so that the picture on the cover of the box containing the film would not give probable cause for an arrest based on the ground that the film as a whole is obscene. However, the appellant also sold the arresting officer a deck of cards depicting various positions of sexual intercourse and three magazines with sexual intercourse graphically depicted. The officer looked through the cards and magazines, and we think she had sufficient cause to arrest the appellant under 22 O.S.1971, § 196, ¶ 1, even though the appellant ultimately was charged only with the sale of the film. Even if the arrest had been illegal, it would not have prevented the trial court from having jurisdiction to try the appellant once she was physically before the court on a criminal charge. It merely would have made any evidence obtained by virtue of the illegal arrest inadmissible in the trial of the accused. See, *Richardson v. State,* Okl.Cr., 511 P.2d 1127

(1973). The film in question was purchased by an undercover police officer from the appellant prior to her arrest, and as this Court has held previously, a prior adversary hearing is not required when the allegedly obscene material is obtained by purchase. *State v. Combs,* supra; *Cherokee News & Arcade, Inc. v. State,* Okl.Cr., 533 P.2d 624 (1974).

The appellant's fourth, fifth and sixth assignments of error may be treated together. She first maintains that the jury's verdict was contrary to the evidence, since the State introduced no evidence with regard to community standards. In case that assignment of error is decided against her, the appellant argues that she put on enough evidence of community standards to shift back to the State the burden of going forward with more evidence, and, finally, she contends that because of the strength of her evidence relating to community standards, the jury's verdict was contrary to the weight of the evidence.

The sum, the appellant is contending that the jury could not legitimately have found the film at issue to be obscene by contemporary standards. This is so, she says, because the State's only witness, the undercover police officer, testified that the film in question did not appeal to her prurient interests and because the appellant put on evidence indicating that the film was the kind of film which sold well in Tulsa. When the sufficiency of the evidence presented at the trial is challenged on appeal — and that is the effect of these three assignments — the proper test is whether a prima facie case was established by the

State. If that test is satisfied, then all questions of fact are for the trier of fact to resolve. Compare *Templer v. State,* Okl.Cr., 494 P.2d 667 (1972). In introducing into evidence the movie, with its depictions of sexual intercourse and fellatio, the State did establish a prima facie case. And of course, expert testimony was not necessary to enable the jury to determine whether or not the film was obscene. *McCrary v. State,* Okl.Cr., 533 P.2d 629 (1974). The jury viewed the movie and heard the appellant's evidence and made its findings. These assignments of error are without merit.

The appellant's seventh assignment of error is that the punishment imposed upon her was at the least excessive and could constitute cruel and unusual punishment. Title 21 O.S.1971, § 1040.51, under which the appellant was charged, provides for a maximum punishment of 15 years' imprisonment and/or a fine of $25,000.00. She received a sentence of three years' imprisonment and a fine of $15,000.00. In her brief, the appellant asserts that Oklahoma is the only state in the United States providing for a possible sentence greater than seven years for an obscenity violation and that half the states have maximum punishments of one year or less. She also claims that 41 states impose a fine of $5,000.00 or less and 30 states impose a fine of $1,000.00 or less. While these data do indicate that Oklahoma's obscenity laws are severe, this is the sort of argument one would make to the Legislature in seeking to have the law changed, rather than to this Court in seeking

to have a conviction under the law voided. Severe is not cruel. To constitute cruel and unusual punishment, a penalty must serve no valid legislative purpose. *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), Justice Marshall concurring. We believe that the penalty provided by Section 1040.51 indicates the Oklahoma Legislature's great concern to put a halt to obscenity traffic in Oklahoma. Clearly, this is a valid legislative purpose.

The appellant also bases an argument on the provisions of 21 O.S.1971, § 1040.8, a misdemeanor, which she says punishes the same conduct as, and was enacted after, Section 1040.51. The United States Supreme Court confronted a similar issue in *United States v. Batchelder,* ____ U.S. ____, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979), and a reading of that case is instructive.

The two statutes in *Batchelder* were both felonies, but they prescribed different punishments for the same act — receiving firearms by a convicted felon. The section with the greater punishment was enacted first and it was under that section that Batchelder was convicted. The Circuit Court of Appeals ordered the later, smaller prison sentence to be substituted for the earlier, longer one, but the Supreme Court held this to be error. Among other things, the Court said that the doctrine of implicit repeal could not be invoked merely by showing that two statutes produced different results in the same situation, but that the provisions must be repugnant to one another.

In *Batchelder* the Court cited two earlier cases: *United States v. Borden,* 308 U.S. 188, 60 S.Ct. 182, 84 L.Ed 181 (1939), and *Berra v. United States,* 351 U.S. 131, 76 S.Ct. 685, 100 L.Ed. 1013 (1956). According to *Borden,* when two different statutes apply to the same subject matter the rule is to give effect to both statutes if it is possible. *Berra* involved two tax statutes, which the Court construed as identical. The Court without discussion said that the trial court was correct in refusing to instruct the jury that it could return a conviction under the statute with the smaller penalty, when the accused had been charged under the one with the larger penalty.

Finally, the Supreme Court saw no problem in the fact that the prosecutor could choose which statute to apply:

> "[T]here is no appreciable difference between the discretion a prosecutor exercises when deciding whether to charge under one of two statutes with different elements and the discretion he exercises when choosing one of two statutes with identical elements . . . . The prosecutor may be influenced by the penalties available upon conviction, but this fact standing alone does not give rise to a violation of the Equal Protection or Due Process Clauses . . . . (Citations omitted)

On the basis of *Batchelder, Borden,* and *Berra,* we find no merit in the seventh assignment of error.

Assignment number eight on the other hand, raises genuine problems. In that assignment, the appellant complains of the trial court's denial of her requested instructions, and asserts that the instructions given assured a verdict of

guilty. The most serious problem is the lack of a scienter instruction. In *Hanf v. State,* Okl.Cr., 560 P.2d 207 (1977), we prospectively required that the following instruction be given:

> "You are instructed that the words 'knowingly' and/or 'wilfully,' as used in these instructions require that you must find beyond a reasonable doubt from all the evidence in this case (either direct or circumstantial or both) that the defendant knew the contents of the material introduced into evidence as State's Exhibit(s) No.(s) ____."

Although the instant case was tried before our decision in *Hanf,* we did not make new law in that opinion. Requiring the State to prove scienter in an obscenity case is not a new requirement. See *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959). We merely set forth in *Hanf* a proper instruction to ensure that in the future the scienter issue would be sufficiently put to the jury.

The appellant in the present case submitted three requested instructions relating to scienter, yet the only reference to scienter was in instruction No. 3, which stated that "any person who *knowingly* buys, sells . . . any moving picture . . . which is obscene, . . . is deemed guilty of a felony . . . ." (Emphasis added) The State argues that because the word "knowingly" was in the information and because the jury was instructed that the State had to prove each element alleged in the information beyond a reasonable doubt, there was a sufficient instruction on scienter. *This is absurd.* If one followed the State's argument, there would only be two instructions necessary in any criminal case — one iterating what was set out in the information and one saying that the State was required to prove everything alleged in the information beyond a reasonable doubt.

On the other hand, however, both the United States Supreme Court and this Court have held that the State is not required to prove that a defendant knew that the material she was selling met the legal definition of obscenity, only that she knew the character and nature of the material she was selling. *Smith v. California,* supra, and *Hanf v. State,* supra. In the instant case it is clear from the evidence that the appellant knew the character and nature of the film when she sold it. The police officer and her companion asked the appellant if she "had some films with some good stuff in it," and the appellant showed them two films, a deck of cards and three magazines. As mentioned above, the cards and the magazines showed sexual intercourse. The box in which the film was packaged showed a woman committing fellatio. It was error for the court to fail to give a scienter instruction, but we are convinced that there is no reasonable possibility that the verdict would have been different had such an instruction been given. We therefore hold the error harmless.

In this same assignment of error, the appellant raises a number of arguments which are also without merit. She complains that the trial court failed to tell the jury that "contemporary community standards" meant statewide

standards, but that is not the law. *Hamling v. United States*, supra. She makes the same objection to the verdict form that she made to the information, and we make the same answer. See the second assignment of error.

The appellant next complains this assignment that the instructions given to the jury did not properly incorporate the factors required by *State v. Combs,* supra. But compare the requirement of *Combs* quoted above under the first assignment of error, with the fourth instruction given by the trial court, which defined "obscene" as follows:

> "1. The moving picture must depict, in a patently offensive way, an act or acts of sexual intercourse or unnatural copulation; and
>
> "2. In addition thereto, the moving picture must patently offend contemporary community standards; and
>
> "3. In addition thereto, the moving picture, when such community standards are applied, must have as its dominant theme an appeal to the prurient interest of the average person when taken in its entirety; and
>
> "4. In addition thereto, the moving picture must have no serious literary, artistic, political or scientific value."

Clearly, the trial court was complying with our requirement by instructing the jury in accord with *Miller v. California, supra.*

The appellant argues that when read as a whole, the instructions are confusing on the issue of obscenity and says the jury must have misunderstood the *Miller* standards because they were not given in their proper order. The judge told the jury that the appellant was charged with selling "moving pictures showing acts of sexual intercourse or unnatural copulation, to-wit: 'Aphrodesia, California Orgies', said moving picture being obscene." Instruction No. 3, quoted in part above, stated that it is a felony to sell a moving picture "which is obscene." Instruction No. 4 defined "obscene." Instruction No. 5 defined "prurient interests." Instruction No. 6 told the jury that they must decide the obscenity issue on the basis of contemporary community standards, not on their own personal opinions. Instruction No. 7 emphasized the importance of the First Amendment. We do not believe the instructions were confusing nor do we find the change in order in Instruction No. 4 significant.

The ninth assignment of error is directed at the behavior of the prosecutor. The appellant first asserts that the Assistant District Attorney commented on her failure to take the stand; but her claim is not supported by the record. The prosecutor did refer to the evidence as being uncontradicted, and while it is true that such a comment could in some cases constitute error — for instance, in a rape case where the only evidence was the victim's testimony and the only possible contradiction would be the testimony of the defendant — we have generally held it not error for a prosecutor to say that the State's evidence has not been contradicted. See, for example, *Davidson v. State,* Okl.Cr., 550 P.2d 974 (1976).

The appellant also asserts that the prosecutor was commenting on her failure to take the stand when he made the following comment:

> " . . . It's amazed me that Mrs. Hunt sat back there as a spectator this whole time. She's not a spectator. She's a defendant. Don't be misled."

However, when taken in context it is clear that this is not a comment on the appellant's failure to take the stand, but rather a comment on the fact that she was sitting in the audience instead of at counsel table. The next comment made by the prosecutor was, "She's sitting back there instead of at counsel table where she belongs." In view of the nature of the case and the evidence presented by the appellant at the trial, we do not find that the prosecutor's comments were error.

The appellant has a second complaint about the prosecutor's argument, however, which has some merit. During direct testimony a psychology professor presented by the appellant, said that 85-90% of all men and 65-70% of all women in the United States have at some time been exposed to sexually explicit materials. The professor remarked in passing that most people are exposed to such material when they are adolescents. On cross-examination the prosecutor seized on this remark:

> "Q. And I believe you told Mr. Gasaway that it's our kids who see it; is that correct?
>
> "A. I didn't say that.
>
> MR. GASAWAY: Your Honor, I object and —"

The appellant's objection was sustained as to the form of the question. But the prosecutor reemphasized the issue in his closing argument:

> ". . . But when did he tell you they saw it? When in their life, in their development, did they see it? When they were adults? That's not what he said. You know what he said far better than I."

The obscenity issue at trial was whether or not one particular movie was obscene; but the prosecutor insisted on discussing the impact of pornography on the community. The State cannot claim that the error was invited, because the appellant did not raise the subject. The witness' statement was not in response to a question, but was thrown in passing, and the appellant never returned to the subject.

The prosecutor's comment is, for an obscenity case, the equivalent of commenting on the crime rate in a robbery case and cannot be allowed. In *Hildahl v. State,* Okl.Cr., 536 P.2d 1292 (1975), we were forced to reverse a conviction, partly because of improper instructions but also because of comments by the prosecutor. Compare *Stockton v. State,* Okl.Cr., 536 P.2d 982 (1975), in which we modified the sentence after the prosecutor talked about obscene materials getting into the hands of children. In the instant case, there is no doubt of the appellant's guilt but it is highly likely that the prosecutor's argument influenced the jury to return a more severe punishment than they might otherwise have done. For that reason we modify the sentence.

The final assignment of error is a cumulative error argument. The appellant asserts that there were numerous irregularities during her trial and argues that when the proceedings are viewed as a whole it can be seen that she did not get a fair trial. It is true that there are one or two things which, while correct, could have been done better. One example is the wording of the information. Also, things which should have been done were not — for instance, an instruction on scienter — and things which should not have been done were, such as the prosecutor's remarks. We have dealt with these issues individually and, on the whole, we do not believe that a reversal is called for. However, we have determined that it would be appropriate to modify the sentence from three (3) years' imprisonment and a fine of Fifteen Thousand Dollars ($15,000.00) to one (1) year's imprisonment and a fine of Five Thousand ($5,000.00) Dollars, and as MODIFIED the judgment and sentence is AFFIRMED.

AN APPEAL FROM THE DISTRICT COURT,
TULSA COUNTY, OKLAHOMA,
HONORABLE RICHARD V. ARMSTRONG, JUDGE

DOROTHY NELL HUNT, appellant, was charged with the offense of Unlawful Sale of Movies Showing Acts of Sexual Intercourse or Unnatural Copulation; was sentenced to three (3) years' imprisonment and assessed a fine of Fifteen Thousand Dollars ($15,000.00), and appeals. The judgment and sentence is MODIFIED to a term of one (1) year's imprisonment and a fine of Five Thou-

sand Dollars ($5,000.00) and otherwise AFFIRMED.

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Attorneys for Appellee.

OPINION BY CORNISH, P. J.
BRETT, J., CONCURS IN PART AND DISSENTS IN PART
BUSSEY, J., CONCURS

BRETT, J.: Concurs in part, and dissents in part.

I concur that the sentence in this conviction should be modified. However, I dissent to the treatment of this conviction as a felony for the reason I believe that it should have been prosecuted as a misdemeanor.

Notwithstanding what the United States Supreme Court held in *United States v. Batchelder,* supra, while interpreting the Federal statutes and procedure, I believe that the action of the Oklahoma legislature, in passing the misdemeanor statute 22 O.S. 1971 §1040.8, which became effective March 27, 1979, repealed by implication the provisions of 21 O.S. 1971, §1040.51, the felony statute, which became effective April 29, 1968. Therefore, I believe the charge should have been lodged as a misde-

meanor instead of a felony, and I believe this conviction should be for a misdemeanor.

The subsequent misdemeanor statute covers everything that the felony statute covered and even more. The felony statute provides in brief, that any person who knowingly buys, barters, traffics in, causes to be delivered or transported any picture; series of pictures, drawing, diagram or photograph; or any person or animal or caricature in any act or acts of sexual intercourse or unnatural copulation, shall be deemed guilty of a felony.

The subsequent misdemeanor statute provides, in brief, that any person who knowingly photographs, act in, pose for, print, sell, offer for sale, give away, exhibit, publish or offer to publish, otherwise distribute, make, display or exhibit any book, magazine, story or pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture, image, cast, slide, figure, instrument, statue, drawing, presentation or other article which is obscene, lascivious, lewd or unfit as defined in 21 O.S. Supp. 1968, §1040.12, shall be guilty of a misdemeanor.

Considering the two statutes, I believe it is improper to authorize the prosecutor to elect whether to charge a defendant with a felony or a misdemeanor for the same act committed under the same circumstances by persons in like situations.

With the exception of our holding in *McCrary v.*

State, 507 P.2d, 925 (1973), the generally held view is that giving the prosecution discretion to choose whether to charge a defendant with a felony or a misdemeanor for the same act committed under the same circumstances by persons in like situations, is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution. See, inter alia, *People v. Calvaresi,* Colo., 534 P.2d 316 (1975); *State v. Blanchey,* 75 Wash. 2d 926, 454 P.2d 841 (1969), cert. denied 396 U.S. 1045, 90 S.Ct. 694, 24 L.Ed.2d 688 (1970); *Olsen v. Delmore,* 48 Wash. 2d 545, 295 P.2d 324 (1956); *State v. Pirkey,* 203 Or. 697, 281 P.2d 698 (1955), in which it was stated at page 701, "The constitution does not require that a law shall affect all persons exactly alike, but there is a guarantee of like treatment to all persons similarly situated." *Clark v. State,* 53 Ariz. 416, 89 P.2d 1077 (1939).

In this jurisdiction, prior to *McCrary,* 507 P.2d, supra, this Court held that where the terms of a later statute are repugnant to the terms of a prior statute, the later statute supersedes the earlier statute, and the earlier statute is deemed to be implicitly repealed by the enactment of the later statute. See, *Atchley v. State,* Okl.Cr., 473 P.2d 286 (1970), wherein this Court held that 47 O.S. 1961, §11-903, providing criminal sanctions for negligent homicide, superseded 21 O.S. 1961, §716, the manslaughter statute, as it pertained to death by criminal negligence of another by the driving of an automobile. Nor do I think

it can be said that 21 O.S. 1971, §11, can or does authorize the legislature to pass statutes giving the prosecutor the option of choosing whether to file a misdemeanor or a felony charge against a person on the basis of prosecutorial whim. It is clear to me that the statement, "But an act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions," refers to such situations as in *Crutchfield v. State*, Okl.Cr., 553 P.2d 504 (1976), where the State chose to charge the defendant with the crime of injury to public buildings rather than with the crime of injury to pipes and wires, where the defendant injured a public building by carrying out pipes and wires. As the last amendment to 21 O.S. 1971, § 1040.8, occurred after the enactment of 21 O.S. 1971, §1040.51, and as the rulings of the Supreme Court of the United States pertaining to the interpretation of state statutes, and of this Court have determined that the two statutes proscribe exactly the same, therefore we should declare that 21 O.S. 1971, § 1040.51, has been implicitly repealed by 21 O.S. 1971, § 1040.8, to the extent that the two statutes prohibit the same activity.

Therefore I concur that the sentence herein should be modified, but I dissent to the treatment of this conviction as a felony conviction.

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F 76-821

DOROTHY NELL HUNT,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

PETITION FOR REHEARING

Comes now the above named appellant, Dorothy Nell Hunt, in the above entitled action, by and through her attorneys of record, Doyle, Holmes, Gasaway & Green, by Don E. Gasaway, and respectfully shows this Court as follows:

ONE: That on the 10th day of October, 1979, this Court entered its Order affirming the conviction, as modified by this Court, of the above named appellant.

TWO: That this Court made various errors as to the application of law and facts as adduced from the transcript of the original trial. In support of same, appellant would show the Court:

A. That the Court of Criminal Appeals erred in upholding the instructions submitted by the trial court, in that said instructions, without the benefit of the scienter instruction, deserve more than a mere modification. The appellate court, in putting its place in a position of the trier of the fact, has invaded the province of the jury by

concluding that guilt was overwhelming. That it is mere speculation by the appellate court as to what a jury would have done, had it been properly instructed in the scienter instruction.

B. That the appellant did request various instructions be submitted to the jury, as referred to in the trial transcript, more specifically, a request for an instruction as to state-wide community standards, which the appellate court has said is not the law. This writer would refer the Court to *McCrary v. State of Oklahoma,* which came down after *Hamling v. United States*, wherein the State of Oklahoma, in syllabi nine, said:

> "In an obscenity prosecution, the jury need not consider nor need the state put on ancillary evidence of hypothetical and unascertainable 'national standards'; rather, the jury need only apply contemporary *state* community standards." (Emphasis added)

It is safe to presume in this case that the jury did not apply any state standards but merely, prevailed upon its own personal knowledge of the local community.

C. That the appellate court does not have constitutional authority to modify a sentence, and by doing so and not reversing same, creates an unequal protection of law standards to the detriment and prejudice and violation of due process of the defendant.

D. That by allowing the prosecutor to select which statute he desires to proceed under, the defendant has been denied due process under the laws, and violations

of the Fourteenth Amendment of the United States Constitution. That the Court erroneously ruled on that question of law.

E. That the Court erred by holding the statute constitutional and allowing the trial court to overlay the Miller elements upon the statute that does not give adequate notice of what the crime is so that the defendant could guard against said violation.

F. That the Court erred in not holding that the continuing burden of proof shifts back to the State of Oklahoma after adequate testimony as to the Miller elements by the defendant.

G. That the Court failed to rule on the request to include the instruction by the defendant of a lesser offense, to wit: an instruction on 22 O.S. 1040.8.

H. That the Court erred by holding that the result would have been different, since to do so puts the Court in a position of judging the facts and invading the province of the jury, which it is said in the opinion dated October 10, that it can not do, but has done anyway.

I. The Court has further erred by not directing the trial court to apply the *Hanf* instruction. That this writer recognizes scienter is not a requirement as set forth in *Smith v. California*, but should be applied uniformly in all cases.

WHEREFORE, premises considered, the appellant requests the Honorable Court to reconsider and reverse

and remand the case to the district court of Tulsa County for trial, and allow the appellant oral argument before the Honorable Court in support of this petition for rehearing. That a brief is attached hereto in support of various portions of the petition for rehearing, for the Court's consideration.

DOYLE, HOLMES, GASAWAY
& GREEN
By Don E. Gasaway
P.O. Box 1679
Tulsa, Oklahoma 74101
(918) 582-0090

CERTIFICATE OF MAILING

I, Don E. Gasaway, do hereby certify that I placed a true and correct copy of the above and foregoing instrument in the United States Mail, postage prepaid, to the Attorney General, State Capitol Building, Oklahoma City, Oklahoma, and to the District Attorney, Tulsa County Courthouse, Tulsa, Oklahoma, on the ____ day of October, 1979.

Don E. Gasaway

APPENDIX C

IN THE COURT OF CRIMINAL APPEALS
OF THE STATE OF OKLAHOMA

No. F-76-821

DOROTHY NELL HUNT,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

ORDER DENYING REHEARING

In her Petition for Rehearing the Appellant raises a number of issues. However, Rule 1.18 of the Rules of this Court provides that an Appellant may seek a rehearing on a question if it was raised on appeal but overlooked by this Court, or if the Court's decision conflicts with a statute or prior case. Paragraphs A,D,E,F,G and I of the Appellant's Petition for Rehearing do not satisfy either of those criteria, and we need not consider them.

Paragraph B, on the other hand, does merit consideration. In the Appellant's case we rejected her claim that the trial court erred in refusing to instruct the jury to use a state-wide standard in deciding the obscenity issue. She asserts that this holding is in conflict with *McCrary v. State,* Okl.Cr., 533 P.2d 629 (1974), where we said, "The jury need only apply contemporary state community standards." In *McCrary* we were relying on *Miller v. California,* 413 U.S. 15 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), where the Supreme Court said, "Nothing in the First Amendment requires that a jury must consider hypothe-

tical and unascertainable 'national standards' . . ." But on the same day we decided *McCrary* the Supreme Court decided *Hamling v. United States,* 418 U.S. 87 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). In *Hamling* the Supreme Court said that by rejecting national standards in *Miller* it did not intend to imply that some smaller geographical area was to be used: The result of the Miller cases, therefore, as a matter of constitutional law . . ., is to permit a juror sitting in obscenity cases to draw on knowledge of the community or vicinage from which he comes in deciding what conclusion 'the average person, applying contemporary community standards' would reach in a given case." In *Hamling* the Supreme Court rejected the very inference which this court made from *Miller* in *McCrary*. The holding in *McCrary* concerning statewide standards must accordingly be overruled.

Paragraphs C and H challenge the power of this Court to modify a sentence and to declare an error harmless. The United States Supreme Court upheld the constitutionality of the concept of harmless error in *Schneble v. Florida,* 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). The power to modify is given to us by 22 O.S. 1971 §1066. The Appellant claims that this statute is unconstitutional, but we do not accept her argument. Inasmuch as all cases on appeal are treated the same, there is no denial of due process or equal protection. Differences in results are dictated by differences in the circumstances of the cases, not by any discrimination.

IT IS THEREFORE THE ORDER OF THIS COURT, that the Petition for Rehearing should be, and the same hereby is, DENIED.

WITNESS OUR HANDS, and the Seal of this Court, this 13th day of November, 1979.

TOM R. CORNISH,
PRESIDING JUDGE

HEZ J. BUSSEY,
JUDGE

ATTEST:
CLERK

APPENDIX D

§ 1040.8 Publication, distribution or participation in preparation of any obscene material or presentation — Unsolicited mailings — Penalty

It shall be unlawful for any person to knowingly photograph, act in, pose for, model for, print, sell, offer for sale, give away, exhibit, publish, offer to publish, or otherwise distribute, make display, or exhibit, any obscene book, magazine, story, pamphlet, paper, writing, card, advertisement, circular, print, picture, photograph, motion picture film, image, cast, slide, figure, instrument, statue, drawing, presentation, or other article which is obscene, filthy, indecent, lascivious, lewd or unfit, as defined in Title 21 of the Oklahoma Statutes, § 1040.12, and in the case of any unsolicited mailing of any of the material hereinabove mentioned, the offense is deemed complete from the time when such letter is deposited in any post office or delivered to any person with intent that it shall be forwarded; and the party may be indicted and tried in any county wherein such material is so deposited or delivered, or in which it shall be received by the person to whom it is addressed, and any person who shall violate any provision of this act shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment in the county jail for a period of not more than one (1) year or by a fine of nor more than One Thousand Dollars ($1,000.00) or by both such fine and imprisonment. Laws 1961, c. 230, § 1, emerg. eff. July 26, 1961.

Amended by Laws 1970, c. 91, § 1, emerg. eff. March 27, 1970.

Supreme Court, U. S.
FILED
MAY 1 1980
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1317

DOROTHY NELL HUNT,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF
THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

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April, 1980

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1317

DOROTHY NELL HUNT,
Petitioner,

VERSUS

STATE OF OKLAHOMA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RESPONDENT'S BRIEF IN OPPOSITION

The respondent Jan Eric Cartwright, Attorney General of the State of Oklahoma, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the Oklahoma Court of Criminal Appeals entered on October 10, 1979.

OPINION BELOW

The opinion of the Court of Criminal Appeals is reported at 601 P.2d 464 (Okl.Cr. 1979).

JURISDICTION

The judgment of the Oklahoma Court of Criminal Appeals was entered on October 10, 1979. A petition for rehearing was denied on November 13, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Eighth Amendment to the United States Constitution provides as follows:

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in part:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Title 21 O.S. § 1040.51 provides as follows:

> *"Pictures, movies, etc. showing acts of sexual intercourse or unnatural copulation prohibited—Exceptions —Penalties.* — Any person who knowingly buys, sells, barters, traffics in, or causes to be delivered or transported in Oklahoma, any picture, moving picture, series of pictures, drawing, diagram or photograph of any person or animal or caricature thereof in an act or acts of sexual intercourse or unnatural copulation shall be deemed guilty of a felony, and shall be punished by a fine of not to exceed Twenty-five Thousand Dollars ($25,000.00), or by imprisonment for not to exceed fifteen (15) years, or by both such fine and imprisonment. Provided, that nothing contained herein shall prohibit the use of any of the above mentioned items pursuant to medical prescription by a duly licensed physician in the State of Oklahoma, or in recognized schools of medicine or veterinary science for educational purposes. The provisions of this Act shall not apply to any motion pictures produced or manufactured as commercial motion pictures which (1) have the seal under the Production Code of the Motion Picture Association of America, Inc.; or (2) are legally imported from foreign countries into the United States and have been passed by a Customs Office of the United States Government at any port of entry."

Title 21 O.S. § 1066 reads as follows:

> *"Power of appellate court—Return by clerk of lower court when new trial granted.* — The Appellate Court may reverse, affirm or modify the judgment appealed from, and may, if necessary or proper, order a new trial. In either case, the cause must be remanded to the court below, with proper instructions, and the opinion of the court, within the time, and in the manner, to be prescribed by rule of the court.
>
> "If the case is reversed for a new trial, the clerk of the court from which such cause was appealed is required to make return showing that said case was specifically called to the attention of the trial court at the time of the setting of the docket following receipt

of mandate, and showing the court's action in placing said cause on the docket for trial, said return to be made immediately after the trial and entry of judgment, or earlier disposal. Should the case not be retried and should it be dismissed by the court, return shall be made, giving the reasons stated by the court in his minutes justifying such dismissal."

Title 22 O.S. § 926 provides as follows:

"*Punishment, jury may assess, when.* — In all cases of a verdict of conviction for any offense against any of the laws of the State of Oklahoma, the jury may, and shall upon the request of the defendant assess and declare the punishment in their verdict within the limitations fixed by law, and the court shall render a judgment according to such verdict, except as hereinafter provided."

QUESTIONS PRESENTED FOR REVIEW

1. Is the Oklahoma statute, 22 O.S. § 1040.51, which prohibits the sale of moving pictures of persons in the act of "sexual intercourse or unnatural copulation" and which has incorporated the *Miller* standards, unconstitutionally vague?

2. Does the Oklahoma statute, 22 O.S. § 1066, which permits the Oklahoma Court of Criminal Appeals to modify a defendant's sentence, deprive a defendant the right to a fair and impartial trial by jury?

3. Does the fact that under Oklahoma law a prosecutor has discretion as to whether to file a felony or a misdemeanor charge against a defendant for the same act constitute a denial of due process?

4. Is the failure of the trial court to give a scienter instruction reversible error in every case, despite the fact that it is clear beyond a reasonable doubt from the evidence presented that the defendant was aware of the contents of the material which she sold?

STATEMENT OF THE CASE

Dorothy Nell Hunt (hereinafter referred to as petitioner) was charged by Information in the District Court of Tulsa County, State of Oklahoma with the crime of Unlawful Sale of a Movie Showing Acts of Sexual Intercourse or Unnatural Copulation Which is Obscene in violation of 21 O.S. § 1040.51.

Petitioner was represented by counsel and convicted by a jury on March 3, 1976. At trial the evidence presented by the State revealed that an undercover officer with the

Tulsa Police Department went to petitioner's apartment in Tulsa with a companion. The companion asked petitioner if she "had some films with some good stuff in it" (Tr. 111). The petitioner went to her kitchen and returned with some materials, including the film "Aphrodisia, California Orgies." The film was in a box upon which was a picture of a couple engaged in sexual acts (Tr. 120). The officer purchased the film along with another film, three magazines, and a deck of cards (Tr. 128). The film purchased by the officer, "Aphrodisia, California Orgies," was shown to the jury and was the basis of petitioner's conviction. In her defense petitioner presented four (4) witnesses, a psychologist (Tr. 151), a theatre manager (Tr. 197), and two (2) clerks from different adult bookstores (Tr. 197, 205). The petitioner (defendant) was also allowed to show the jury the film "Naked Came the Stranger," which was then playing at a local movie theatre (Tr. 180, 216).

At the close of the evidence the jury received their instructions, two of which were as follows (R. 39, 40):

INSTRUCTION NUMBER 3

"You are instructed that under the laws of the State of Oklahoma, any person who knowingly buys, sells, barters, traffics in, or causes to be delivered or transported in Oklahoma, any moving picture, among other things not relevant hereto, of any person or animal or caricature thereof engaged in an act or acts of sexual intercourse or unnautral copulation which is obscene, as that term is hereinafter defined, is deemed guilty of a felony, and is subject to being punished by a fine of not to exceed Twenty-five Thousand Dollars ($25,000.00), or by imprisonment for a term not to exceed Fifteen (15) years, or by both such fine and imprisonment both certain exceptions not relevant hereto" (R. 39).

INSTRUCTION NUMBER 4

"The word 'obscene', as used in the preceding in-instruction, includes certain essential ingredients or conditions, all of which must be present, in order for a moving picture to be deemed 'obscene'. These ingredients or conditions which must be present are as follows:

"1. The moving picture must depict, in a patently offensive way, an act or acts of sexual intercourse or unnatural copulation; and

"2. In addition thereto, the moving picture must patently offend contemporary community standards; and

"3. In addition thereto; the moving picture, when such community standards are applied, must have as its dominant theme an appeal to the prurient interest of the average person when taken in its entirety; and

"4. In addition thereto, the moving picture must have no serious literary, artistic, political or scientific value." (R. 40).

The jury returned with a verdict of guilty and a punishment of three (3) years in prison and a fine of $15,000.00, a sentence which was subsequently imposed by the trial court.

Petitioner appealed her conviction to the Oklahoma Court of Criminal Appeals, which affirmed petitioner's conviction. However, the court modified the sentence imposed by the jury, stating that although there was "no doubt" of petitioner's guilt, it was "highly likely" that the prosecutor's argument, in which he discussed the impact of pornography on the community, influenced the jury to return a more severe punishment than they might otherwise have.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE OKLAHOMA STATUTE WHICH REGULATES OBSCENE FILMS, 21 O.S. § 1040.51, IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD SINCE THE STATUTE SPECIFICALLY PROHIBITS THE SALE OF MOVING PICTURES OF PERSONS IN THE ACT OF "SEXUAL INTERCOURSE OR UNNATURAL COPULATION" AND HAS BEEN CONSTRUED TO INCORPORATE THE *MILLER* STANDARDS AS WELL.

The petitioner contends that the statute under which she was prosecuted and convicted, 21 O.S. § 1040.51, is unconstitutionally vague and overbroad on its face. The respondent (hereinafter referred to as "the State") respectfully submits that it has fully complied with the mandates of *Miller* v. *California,* 413 U.S. 15. *Miller* required that the sexual conduct that is to be prohibited in films must be "specifically defined by the applicable state law. . . ." 413 U.S. at 24. Title 21 O.S. § 1040.51 is specific in that it prohibits the sale of moving pictures of acts of "sexual intercourse or unnautral copulation." In addition, the Oklahoma Court of Criminal Appeals has incorporated the other *Miller* standards into this statute. *Combs* v. *State,* 536 P.2d 373, 375-376 (Okl.Cr. 1975). The State disagrees with the statement by petitioner at page 9 of her Petition for Writ of Certiorari that "the Oklahoma Court recognized the unconstitutionality of the statute prior to *Miller,* supra, . . ." The cases cited by the petitioner, *McCrary* v. *State,* 533 P.2d 629 (Okl.Cr. 1974) and *Cherokee News & Arcade, Inc.* v. *State,* 533 P.2d 624 (Okl.Cr. 1974), dealt with different statutes than the one under which petitioner in the present case was prosecuted. Furthermore, in those cases the Court

of Criminal Appeals applied a "saving construction" to those statutes and found them to be constitutional as construed in accordance with *Miller* v. *California,* supra.

Additionally, the conduct proscribed by 21 O.S. § 1040.51 is more than mere nudity. *Cf. Erznoznik* v. *City of Jacksonville,* 422 U.S. 205. Furthermore, the *Miller* construction and the instructions in the present case insure that even the depiction of "sexual intercourse or unnatural copulation" cannot be prohibited unless the film depicts such "in a patently offensive way", must "patently offend contemporary community standards", has "as its dominant theme an appeal to the prurient interest of the average person when taken in its entirety", and "must have no serious literary, artistic, political or scientific value" (R. 39, 40).

The statute, as construed, compares favorably with other statutes which have been upheld by the United States Supreme Court and is, therefore, in accord with the applicable decisions of this Court. See *Ward* v. *Illinois,* 431 U.S. 767, where the Supreme Court upheld an Illinois obscenity statute, as construed, prohibiting the sale of obscene material as defined by previous judicial decisions of the Illinois Supreme Court. 431 U.S. at 771-773. See also *Splawn* v. *California,* 431 U.S. 595. In *Hamling* v. *United States,* 418 U.S. 87, the Supreme Court upheld the federal obscenity statute which prohibited the sending of "obscene, lewd, lascivious, indecent, filthy or vile" materials through the mail and to which the *Miller* standards were applied.

The State therefore contends that Oklahoma's statute regulating obscene films is in accord with the constitutional requirements mandated by this Court.

2. THE OKLAHOMA STATUTE WHICH PERMITS THE OKLAHOMA COURT OF CRIMINAL APPEALS TO MODIFY A DEFENDANT'S SENTENCE DOES NOT DEPRIVE A DEFENDANT OF A FAIR AND IMPARTIAL TRIAL BY JURY.

Petitioner next contends that 22 O.S. § 1066 deprives her of a trial "on the facts of the matter" by a fair and impartial jury by allowing the Court of Criminal Appeals to modify a sentence which a defendant has appealed from. It should be noted that in Oklahoma the jury is the sentencing authority, and the trial courts are without power to modify the punishment assessed by the jury since this authority is vested exclusively with the Court of Criminal Appeals. 22 O.S. § 926; *Luker* v. *State,* 552 P.2d 715, 719 (Okl.Cr. 1976). In the present case the Court of Criminal Appeals modified the sentence because the prosecutor discussed the impact of pornography on the community in his closing argument. The court found that the remarks were error, but found that because there was "no doubt" of petitioner's guilt, it was highly likely that the argument influenced the jury to return a more severe punishment than they might otherwise have.

The court's finding that there was "no doubt" as to petitioner's guilt is consistent with the harmless error rule which has been approved by this Court. *Schneble* v. *Florida,* 405 U.S. 427. It is submitted that the remarks of the prosecutor in the present case did not constitute a denial of fundamental rights under the Fourteenth Amendment. *Donnelly* v. *DeChristoforo,* 416 U.S. 637. Oklahoma's statute allowing the modification of a sentence should be viewed independently of the finding of harmless error by

the Court of Criminal Appeals. The fact that this statute allows the court to reduce sentences in cases where guilt is clear but a trial error has occured which affected the punishment set by the jury, should not be found to violate the fact finding function of the jury. The State contends that in view of the State's compliance with the principles of the harmless error rule by specifically finding that there was "no doubt" as to petitioner's guilt, no significant federal question has been raised by this contention.

3. THE PROSECUTOR HAS THE AUTHORITY AND THE DISCRETION UNDER BOTH STATE AND FEDERAL LAW TO CHOOSE WHETHER TO CHARGE A DEFENDANT UNDER EITHER A FELONY OR A MISDEMEANOR STATUTE FOR THE SAME ACT.

Petitioner contends that the fact that the same act can be prosecuted as either a felony or a misdemeanor at the discretion of the prosecutor constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It should be pointed out that in her brief before the Oklahoma Court of Criminal Appeals the petitioner claimed that her Eighth Amendment rights had been violated instead. The State further notes that petitioner's contention has been rejected by the United States Supreme Court in *United States* v. *Batchelder,* ___ U.S. ___, 99 S.Ct. 2198, 47 L.W. 4611 (June 4, 1979), and the Oklahoma Court of Criminal Appeals, both in the present case and an earlier one. *McCrary* v. *State,* 507 P.2d 924, 927 (Okl.Cr. 1973), remanded, 414 U.S. 966; aff'd 533 P.2d 629 (Okl.Cr. 1974).

4. IN THE PRESENT CASE, THE FAILURE OF THE TRIAL COURT TO GIVE THE DEFENDANT'S REQUESTED SCIENTER INSTRUCTION WAS NOT A REVERSIBLE ERROR IN VIEW OF THE EVIDENCE PRESENTED AND THE CONTENT OF THE REQUESTED INSTRUCTION ITSELF.

In Argument IV the petitioner contends that reversible error occurred when the trial court "failed to give a scienter instruction." In Oklahoma, where counsel is not satisfied with the instructions that are given or desires the trial court to give any particular instruction, it is the duty of counsel to prepare and present it to the trial court. *Sallee* v. *State,* 544 P.2d 902, 907 (Okl.Cr. 1975). In the present case the petitioner's proposed instructions concerning scienter requested the court to instruct the jury that the prosecution must prove that petitioner "knew the publications were obscene." (R. 69, 70, 71).

In *Hamling* v. *United States,* supra, the Supreme Court rejected the defendant's argument that scienter requires the government to prove that a defendant had an awareness of the obscene character of the material. 418 U.S. 87, 119-124. The Court held that, consistent with the holding of *Smith* v. *California,* 361 U.S. 147, the prosecution does not have to prove the defendant's knowledge of the legal status of the materials he distributes but only knowledge of the contents of such material. Therefore, the proposed instructions of petitioner relating to scienter were based on First Amendment theories rejected in *Hamling* v. *United States,* supra.

Furthermore, the information charging the petitioner and instructions given by the trial court use the word

"knowingly" in describing the conduct prohibited by law (R. 18, 39). The State contends that this general scienter instruction should be sufficient in absence of an exact *Smith* v. *California* proposed instruction submitted by the petitioner and in view of the facts in this case. "An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Henderson* v. *Kibbe,* 431 U.S. 145, 155.

It should be noted that there was never any serious contention at trial that the petitioner did not know what she was selling. The record reveals that a third party asked petitioner "if she had some films with some good stuff in it . . ." (Tr. 111), and the petitioner showed the officer two films, a deck of cards, and three magazines. The Court of Criminal Appeals noted that the cards and the magazines showed sexual intercourse, and "the box in which the film was packaged showed a woman committing fellatio." 601 P.2d at 469. In their closing arguments petitioner's attorneys argued not that the petitioner did not know what she was selling, but that the film was not obscene (Tr. 248-258). The Oklahoma Court of Criminal Appeals, therefore, determined that while the failure to give a proper scienter instruction "raises genuine problems," it was harmless error. The court recognized that the trial took place prior to their decision rendered in *Hanf* v. *State,* 560 P.2d 207 (Okl.Cr. 1977), in which the Court of Criminal Appeals set forth a model instruction based upon *Smith* v. *California,* supra, for the trial courts in Oklahoma to follow.

In view of the foregoing facts, the Court of Criminal Appeals was correct in finding that the failure to give the *Hanf* instruction was harmless error.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April, 1980

CERTIFICATE OF SERVICE

On this _____ day of April, 1980, 3 (three) true and correct copies of the foregoing Brief in Opposition were served as prescribed by the Rules of this Court, by placing same in the U. S. Mail, postage fully prepaid, to:

Don E. Gasaway
1850 South Boulder
Tulsa, Oklahoma 74101

_____

David W. Lee